AAI AMERICAN ANTITRUST INSTITUTE

Class Action Issues Update
Spring 2020

The American Antitrust Institute (AAI) seeks to preserve the effectiveness of antitrust class actions as a central component of ensuring the vitality of private antitrust enforcement.[1] As part of its efforts, AAI issues periodic updates on developments in the courts and elsewhere that may affect this important device for protecting competition, consumers and workers. This update covers developments since our Fall 2019 update.

I. Specific Personal Jurisdiction

As we have chronicled in several previous updates, including our Fall 2019 update, the Supreme Court's 2017 decision in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), which prevents defendants who are engaged in nationwide conduct from being subject to a mass action by plaintiffs injured both within and outside the forum State if general jurisdiction is lacking, has engendered questions in the lower courts as to whether such defendants can be subject to a class action brought by such plaintiffs. If not, nationwide or multi-state classes of plaintiffs likely would be unable to bring class actions except in a defendant's home state. District courts that have considered the question have split, although a recent study shows that a large supermajority of district courts to consider the question—50 out of 64 opinions—have refused to extend *Bristol-Myers* to unnamed, out-of-state class members.

Over the span of two weeks in March, three federal circuit courts ruled on the issue, and all three held that *Bristol-Myers* does not bar nationwide class actions prior to class certification notwithstanding that specific jurisdiction may be lacking for unnamed class members.

In the first case, *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293 (D.C. Cir. 2020), the D.C. Circuit held on March 10, "[a]bsent class certification, putative class members are not parties before a court," and therefore a motion to dismiss based on putative class members' lack of specific personal jurisdiction is premature prior to class certification. The court explained that, in a certified class action, the unnamed class members are parties for some purposes and non-parties for other purposes. But "putative class members," by contrast, "are *always* treated as non-parties" under the Supreme Court's holding in *Smith v. Bayer Corp.*, 564 U.S. 299 (2011). The court explained that the party status of putative class members is antecedent to the question of personal jurisdiction, and "it is class

[1] The American Antitrust Institute is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. We serve the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. For more information, see http://www.antitrustinstitute.org. Comments on this update or suggestions for AAI amicus participation should be directed to Randy Stutz, rstutz@antitrustinstitute.org, (202) 905-5420.

certification that brings unnamed class members into the action and triggers due process limitations on a court's exercise of personal jurisdiction over their claims."

Judge Silberman, dissenting, would have allowed defendants to seek dismissal of unnamed class plaintiffs' claims insofar as defendants sought to challenge the named plaintiffs' entitlement to *bring* the claims on behalf of the unnamed putative class members. Judge Silberman also believes that "logic dictates" that *Bristol-Myers* should be extended from mass actions to class actions, because a class action is "just a species of joinder," and personal jurisdiction must be satisfied independently for "the specific claims at issue." The opinion for the court, written by Judge Tatel and joined by Judge Garland, rejected the characterization of the dismissal motion as a challenge to the named plaintiffs' entitlement to bring class claims, because the defendant moved to dismiss the nonresident claims for lack of personal jurisdiction and not based on the named plaintiffs' failure to satisfy Rule 23.

In the second case, decided the day after *Molock*, on March 11, the Seventh Circuit in *Mussat v. IQVIA, Inc.*, in an opinion by Chief Judge Wood, went further than the D.C. Circuit and affirmatively held that *Bristol-Myers* does not apply to class actions. After explaining the Supreme Court's holding in *Devlin v. Scardelletti*, 536 U.S. 1 (2002), that "'[n]onnamed class members ... may be parties for some purposes and not for others,'" the court held, "[t]he rules for class certification support a focus on the named representative for purposes of personal jurisdiction."

In support of this view, Chief Judge Wood observed that Rule 23(b)(3) lists "the desirability or undesirability of concentrating the litigation of the claims in the particular forum" as a factor for certifying damages classes, and that the Committee Note to this provision mentions that a court should consider the desirability of the forum "in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought." Accordingly, the court saw "no reason why personal jurisdiction should be treated any differently from subject-matter jurisdiction and venue: the named representatives must be able to demonstrate either general or specific personal jurisdiction, but the unnamed class members are not required to do so." Any other rule, said the court, would work "a major change in the law of personal jurisdiction and class actions." The defendant subsequently petitioned for en banc rehearing, and, on May 14, the petition was denied.

In the third case, decided March 25, the Fifth Circuit in *Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240 (5th Cir. 2020), reversed a district court holding that the defendant had waived a personal jurisdiction defense in a class action after it failed to assert the defense until seven months after *Bristol-Myers* was decided. Although the court did not reach the question of whether *Bristol-Myers* applies to class actions, the court held that waiver could not have applied under the circumstances because "a personal jurisdiction objection was not 'available' with respect to the putative claims of unnamed … non-residents." Reasoning in the same vein as the D.C. Circuit in *Molock*, the court held, "Prior to certification, those nonresidents were 'not yet before the [district] court,' their possible 'future' claims against Jackson were 'hypothetical,' and so there was no 'justiciable controversy between [Jackson] and [them].'"

Quoting the same opinion cited by the D.C. Circuit—*Smith v. Bayer Corp.*—the court held that allowing a personal jurisdiction objection prior to class certification "would validate 'the novel and surely

erroneous argument that a nonnamed class member is a party to the class-action litigation before the class is certified.'" The personal jurisdiction objection therefore could not have been waived prior to class certification.

In sum, the federal circuit courts are thus far unanimous in holding that the issue of personal jurisdiction over unnamed class members is not properly before a court prior to class certification. The Seventh Circuit holds that plaintiffs must establish personal jurisdiction *only* over named class members, not unnamed members. To date, no circuit court has held that *Bristol-Myers* bars nationwide class actions in forum states where general jurisdiction is lacking.

In the Ninth Circuit, the question whether a defendant waives a personal jurisdiction defense by failing to assert it prior to class certification, much like the question resolved in *Cruson*, is currently on interlocutory appeal in *Moser v. Health Ins. Innovations, Inc.* No. 19-56224 (9th Cir. docketed Oct. 23, 2019). The appellants' opening brief is due July 31, 2020.

In January, the Supreme Court granted certiorari in two consolidated cases, *Ford Motor Co. v. Montana Eighth Judicial Dist. Ct.*, No. 19-368, and *Ford Motor Co. v. Bandemer*, No. 19-369, addressing the "arise out of or relate to" requirement for specific personal jurisdiction. If the Court adopts a strict standard requiring a causal connection between the plaintiff's claimed injury and the defendant's contacts with the forum state, as the petitioners request, the stakes would be raised as other circuit courts consider whether to apply *Bristol-Myers* to class actions. If, for example, personal jurisdiction requires that the defendant's contacts with the forum state must be the but-for or proximate cause of each plaintiff's claimed injury, then nearly all nationwide classes would be left without a venue other than the defendant's home state, which would result in significant litigation advantages for corporate antitrust defendants. The *Ford* cases are currently being briefed, and oral argument will be scheduled during the October 2020 term.

II. Classes Containing Uninjured Class Members

As discussed in our Spring 2017, Fall 2017 and Fall 2018 updates, there is recurring debate in the federal courts over the rules and standards that govern the certification of classes that may contain some class members who were not injured by the defendant's conduct. In our Fall 2016 Update, we noted that the Supreme Court's opinion in *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1040 (2016), strongly implied that the presence of uninjured class members does not necessarily defeat class certification.

On November 15, 2019, shortly after our previous update, the Eleventh Circuit in *Cordoba v. DirecTV, LLC*, 942 F.3d 1259 (11th Cir. 2019), addressed the question of whether the presence of uninjured class members defeats class certification on grounds that the allegedly uninjured members lack Article III standing. It answered the categorical question in the negative, but it held that individualized questions of standing can be relevant to the predominance inquiry, and that the standing of allegedly uninjured class members presented an individualized question in this Telephone Consumer Protection Act (TCPA) case.

After the defendant, DirecTV, argued that some class members had not informed it that they did not wish to receive unsolicited phone calls that allegedly violated the TCPA, the court first clarified that only the named plaintiffs in a class action must show "that they personally have been injured, not that

injury has been suffered by other, unidentified members of the class to which they belong." Citing Judge Posner's opinion in *Kohen v. Pacific Investment Management Co. LLC*, 571 F.3d 672 (7th Cir. 2009), the court rejected the proposition "that a class action cannot move forward if there are some uninjured members in the class as it is currently defined."

However, the court, quoting Chief Justice Roberts's concurrence in *Tyson Foods*, held that "'Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.'" And it held that "at some time in the course of the litigation the district court will have to determine whether each of the absent class members has standing before they could be granted any relief." Moreover, standing in this TCPA case did indeed present an individualized question. Accordingly, the court vacated and remanded the class certification order and instructed the lower court to consider whether the "significant individualized standing question" defeats class certification on predominance grounds.

A few months later, in February 2020, in another TCPA case, the Seventh Circuit addressed a defendant's claimed due process interest in ensuring that class members due to receive judgment awards pursuant to a post-trial distribution plan are actually entitled to do so. In *Physicians Healthsource, Inc. v. A-S Medication Sols., LLC*, 950 F.3d 959 (7th Cir. 2020), the court held that the defendant's due process rights were indeed implicated, but only under the unique context of a TCPA claim. Because "unclaimed money can revert to the defendant in TCPA cases," the plaintiffs' argument that a defendant who has already been found to have violated the TCPA has no right to demand evidence that each class member has standing to recover was unavailing.

The court did clarify, however, that the TCPA context was dispositive insofar as each class member's entitlement to damages was linked to the fine associated with each individual fax. And the court explained that it was not disturbing the rule, recently articulated in *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015), that "where damages do not depend on the specific identity of a class member, there is no implication of a defendant's due process rights."

Also in February, in *Ramirez v. TransUnion LLC*, 951 F.3d 1008 (9th Cir. 2020), the Ninth Circuit addressed, as a matter of first impression, the similar question of "who must have standing at the final stage of a money damages suit when class members are to be awarded individual monetary damages." The court recognized that "only the representative plaintiff need allege standing at the motion to dismiss and class certification stages . . . and even at the final judgment stage in class actions involving only injunctive relief." But it held that "each member of a class certified under Rule 23 must satisfy the bare minimum of Article III standing at the final judgment stage of a class action in order to recover monetary damages in federal court." It reasoned: "To hold otherwise would directly contravene the Rules Enabling Act, because it would transform the class action—a mere procedural device—into a vehicle for individuals to obtain money judgments in federal court even though they could not show sufficient injury to recover those judgments individually."

However, the court recognized implicitly that Article III standing can be proven using common evidence because, here, it was. The court explained that the plaintiffs' evidence was sufficient to show that each class member had standing at the final judgment stage because it showed that the defendant's

statutory violation created a "risk of real harm" to plaintiffs' concrete interests, which is a cognizable intangible harm under the Supreme Court's holding in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

Judge McKeown, dissenting, would have held that the evidence was insufficient to establish a concrete injury-in-fact with respect to absent class members. In her view, "the hallmark of the trial was the absence of evidence about absent class members, or any evidence that they were in the same boat as [the named plaintiff]." Judge Mckeown believed "the jury was left to assume that the absent class members suffered the same injury" as the named plaintiff, who had an "unusually sympathetic case," but that "such conjecture is insufficient to confer Article III standing" on absent class members, whose claims "likely bore little resemblance" to the named plaintiff's claims. However, Judge McKeown conceded, "Without doubt, counsel could have offered expert testimony, representative class members, and credit agency protocol to fill this gap." In no sense, she made clear, was she suggesting "that evidence must be proffered as to each class member."

III. The Use of Statistical Evidence to Prove Classwide Damages

In our Fall 2016 Update, we noted that the Supreme Court in *Tyson Foods* had addressed the question of class certification standards when defendants argue that liability and damages determined on the basis of statistical evidence mask substantial differences among class members. Without altering its standards, the Court reiterated that "whether and when statistical evidence can be used to establish classwide liability will depend on the purpose for which the evidence is being introduced and on the elements of the underlying cause of action."

In April, the Third Circuit held that the "rigorous analysis" required by Rule 23 requires courts to resolve the merits of competing expert and factual claims at class certification when a plaintiff relies on statistical averages to prove that common issues predominate over individual issues for purposes of establishing antitrust injury in a market characterized by individualized negotiations.

In *In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184 (3d Cir. 2020), after the plaintiffs successfully certified a class of direct purchasers who challenged a brand drug company's agreement with a generic company not to launch an "authorized generic" version of a drug in exchange for delayed generic entry, the defendants appealed. The drug companies argued that the plaintiffs would be unable to show that injury was capable of common proof at trial because their expert's reliance on statistical averages failed to account for the individual negotiations in the market and ignored that the defendant employed a "discounted-brand competition strategy." According to the defendants, the district court should not have allowed plaintiffs to rely on these averages for class certification purposes without first resolving both the competing expert reports and competing factual disputes underlying the reports.

Where the market was "characterized by individual negotiations and a discounted-brand competition strategy" that "masks the fact that many—up to one-third of the entire class—" may not have suffered injury by overpaying for the drug, the Third Circuit agreed that a more rigorous analysis was required. The Court explained, "While averages may be acceptable where they do not mask individualized injury, … we cannot determine whether that occurred here because of the lack of analysis." The court vacated and remanded so that the district court could analyze the evidence.

IV. Ascertainability

As we have chronicled in several previous updates, the circuit split over whether Rule 23 contains a heightened ascertainability requirement that demands class plaintiffs plead and prove an administratively feasible mechanism for identifying class members may be abating. The tide of decisions has moved against such a requirement, with each of the last five circuit courts to consider a heightened ascertainability requirement having ruled against it. The Second, Sixth, Seventh, Eighth, and Ninth Circuits now reject an administrative feasibility prerequisite, while the First and Third Circuits have embraced some form of a heightened ascertainability requirement. The Fifth, Tenth, and D.C. Circuits have not yet explicitly adopted a position. The Eleventh Circuit has addressed the issue but characterized its position as "unresolved" in *Ocwen Loan Servicing, LLC v. Belcher*, No. 18-90011, 2018 WL 3198552, at *3 (11th Cir. June 29, 2018).

In March, in *Walker v. Life Ins. Co. of the Sw.*, 953 F.3d 624 (9th Cir. 2020), the Ninth Circuit placed a limiting gloss on its principal opinion rejecting a heightened ascertainability requirement, *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1133 (9th Cir. 2017). After a district court certified a class of plaintiffs alleging violations of California's Unfair Competition Law (UCL) and rejected, citing *Briseno*, the defendant's predominance challenge alleging difficulties in identifying class members who necessarily relied on its alleged misrepresentations, the Ninth Circuit held that the district court "may have misapplied" *Briseno* but that any error was harmless.

The Court explained that *Briseno* "does not expressly excuse a district court from considering exposure under the predominance rubric"—"*Briseno*, in fact, did not directly bear on predominance at all" or "preclude consideration of certain issues under predominance." Although the court limited the scope of its holding to UCL cases, it explained that, in general, it "find[s] wisdom in the Sixth Circuit's conclusion that a district court's class-certification analysis would have been 'equally sufficient,' 'regardless of whether th[e] [member-identification] concern [was] properly articulated as part of ascertainability, Rule 23(b)(3) predominance, or Rule 23(b)(3) superiority.'" Thus, *Briseno* does not bar courts in the Ninth Circuit from considering class-member identity issues under the predominance rubric. At the same time, however, the court declined the defendant's invitation "to impugn the district court's class-certification analysis by mandating a one-size-fits-all approach," in which a court is *required* to consider class-member identity issues under the predominance rubric. It was sufficient that "the district court considered the key issue—whether each Plaintiff was exposed to, and thereby could have relied on, the deficient illustrations."

The Supreme Court has repeatedly declined to take up the ascertainability question despite numerous petitions for certiorari.

V. Class Action Waivers in Mandatory Arbitration Clauses

Since our Fall 2016 update, we have been tracking the use of mandatory arbitration clauses in employment agreements, which the Supreme Court upheld in a 5-4 decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

In January 2020, in *Bigger v. Facebook, Inc.*, 947 F.3d 1043 (7th Cir. 2020), the Seventh Circuit addressed, as a matter of first impression, whether a court may authorize class action notice to individual

employees who, according to the defendant, entered valid arbitration agreements waiving their right to join the action. After a district court authorized notice to putative class plaintiffs who were Facebook employees, Facebook appealed, arguing that notice would misinform most employees—by indicating that they may join the action when, in truth, they are prohibited by a class action waiver—and unfairly amplify settlement pressure. The court set forth a new framework for district courts evaluating notice challenges of this kind and remanded so that the trial court could apply the new framework.

The court credited risks that plaintiffs "may wield the collective-action format for settlement leverage" and that notice giving "may become indistinguishable from the solicitation of claims," and it held that a trial court "may not authorize notice to individuals whom the court has been shown entered mutual arbitration agreements waiving their right to join the action." However, the court held that, where a plaintiff contests a defendant's assertion that arbitration agreements bind class members, "[t]he employer seeking to exclude employees from receiving notice has the burden to show, by a preponderance of the evidence, the existence of a valid arbitration agreement for each employee it seeks to exclude from receiving notice."

The court's process requires trial courts to first determine whether the plaintiff contests the existence of valid arbitration agreements and holds that a court may not authorize notice to employees if the agreements are uncontested. However, if a plaintiff contests the defendant's assertions, the court must permit the parties to submit additional evidence on the agreements' existence and validity, and "[t]he employer seeking to exclude employees from receiving notice has the burden to show, by a preponderance of the evidence, the existence of a valid arbitration agreement for each employee it seeks to exclude from receiving notice." The court added, "To be clear, if the employer does not prove that an employee entered a valid arbitration agreement, then the court may authorize notice to that employee—granted, of course, that the employee is otherwise an appropriate notice recipient." The court did not specify the defendant's burden of production in proving the existence and validity of each arbitration agreement, nor whether the defendant is limited in the costs and delay it may impose on plaintiffs seeking authorization to issue class notice.

In February, in an ironic twist, food delivery company DoorDash sought, and was denied, relief from obligations it incurred under its self-imposed mandatory arbitration agreements so that it could avail itself of the benefits of the class action device. In *Abernathy v. DoorDash, Inc.*, No. C 19-07545 WHA, 2020 WL 619785 (N.D. Cal. Feb. 10, 2020), counsel for 5,879 DoorDash couriers filed individual arbitration demands pursuant to an arbitration provision imposed by DoorDash in a click-through hiring contract. At the same time, DoorDash was in the midst of negotiating a class action settlement in a case brought by different counsel challenging the same conduct, which involved the alleged misclassification of workers as independent contractors rather than employees. After DoorDash sought a stay from answering the arbitration demands so that it could negotiate the class action settlement, Judge Alsup refused the request. The court explained:

> For decades, the employer-side bar and their employer clients have forced arbitration clauses upon workers, thus taking away their right to go to court, and forced class-action waivers upon them too, thus taking away their ability to join collectively to vindicate common rights. . . .

> The employer here, DoorDash, faced with having to actually honor its side of the bargain, now blanches at the cost of the filing fees it agreed to pay in the arbitration clause. . . . Instead, in irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed, at least by this order.

In our Fall 2019 update, we noted that, on October 10, 2019, California Governor Gavin Newsom signed California Assembly Bill No. 51, enacting a ban on mandatory arbitration provisions in employment contracts that workers may enforce through private rights of action. However, we observed that it is unclear how the law would fare under a preemption challenge given the Supreme Court's rulings in *AT&T Mobility v. Concepcion* and *Kindred Nursing Centers v. Clark*. In December, the U.S. and California Chambers of Commerce, along with several trade associations, brought a preemption challenge to the enactment in the Eastern District of California, seeking a permanent injunction. On February 7, 2020, the district court granted the plaintiffs' request for a preliminary injunction pending resolution of the merits. The State of California has since appealed the preliminary injunction order, and briefing is now ongoing in the Ninth Circuit.

In our Spring 2019 update, we noted that Sen. Richard Blumenthal (D-CT) and Rep. Hank Johnson (D-GA) had introduced the Forced Arbitration Injustice Repeal Act (FAIR Act), which would eliminate forced arbitration clauses in employment, consumer (including antitrust) and civil rights cases. The Senate bill was introduced with 34 co-sponsors and the House bill was introduced with 147 co-sponsors. On September 6, 2019, AAI and ten other organization submitted a letter in support of the Act, arguing that it would restore the ability of antitrust victims to effectively vindicate their Sherman and Clayton Act rights. On September 20, the House bill passed by a vote of 225-186. Since then, no action has been taken in the Senate. Govtrack currently predicts that the bill has a 2% chance of being enacted, down from 47% at the time of our previous update.

VI. Offers of Judgment and Mootness

In our Fall 2016 update, we noted that the Supreme Court in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), had left open the question of whether a defendant could moot a class action by depositing the full amount of the named plaintiff's individual claim in an account payable to the plaintiff, where the court then enters judgment for the plaintiff in that amount. Our Fall 2016 update noted that the Third, Sixth, and Ninth Circuits had held that named class plaintiffs may continue to seek class certification even if they no longer have a justiciable claim for individual relief. Our Fall 2017 update noted that the Seventh Circuit in *Fulton Dental LLC v. Bisco Inc.*, 860 F.3d 541 (7th Cir. 2017), in an opinion by Chief Judge Wood, went so far as to hold that a deposit of funds into the court registry does not moot a plaintiff's *individual* claim, let alone its class claim, based on principles of contract law. Our Spring 2019 update noted that the Second Circuit resolved an apparent intra-Circuit split by aligning itself with Chief Judge Wood's reasoning in *Fulton Dental*. No circuit court has held that the *Campbell-Ewald* hypothetical moots or otherwise defeats a plaintiff's class claim.

In February, however, in *Joiner v. SVM Mgmt., LLC*, 2020 IL 124671 (Feb. 21, 2020), the Illinois State Supreme Court declined to follow the federal courts, instead channeling Justice Thomas's concurrence

in *Campbell-Ewald*, which focused on the law of tenders rather than principles of contract law. Justice Thomas's *Campbell-Ewald* concurrence distinguished between a "mere offer of relief," which he believed did not moot a case (and which led him to side with the Court's liberal justices), and "a 'tender'—an offer to pay the entire claim before a suit was filed, accompanied by 'actually produc[ing]' the sum 'at the time of tender' in an 'unconditional' manner." Emphasizing differences in the language of the Illinois Code of Civil Conduct relative to the Federal Rules, the state's highest court held: "When a defendant tenders the relief sought by a named plaintiff prior to a motion for class certification, it does not force the plaintiff to accept a settlement against her will, as plaintiffs argue, but admits liability and satisfies plaintiff's demand. A live controversy therefore no longer exists, and the court must dismiss the case if no other plaintiff steps into the named plaintiff's shoes to represent the class." The upshot is that, in Illinois, state-court defendants may be able to delay and add costs to class actions through the tactic of "picking off" named plaintiffs prior to class certification.

VII. The Effect of Class Notice on the Scope of Summary Judgment

The Sixth Circuit recently held, in a matter of first impression, that an order granting summary judgment issued after a class has been certified but before the class members receive notice binds only the named plaintiffs and not the unnamed class members. In *Faber v. Ciox Health, LLC*, 944 F.3d 593 (6th Cir. 2019), after the court upheld the district court's grant of summary judgment to the defendant following this unique sequencing of proceedings, the defendant argued that the court should remand to the district court for the sole purpose of issuing opt-out notices to class members, at the plaintiffs' expense. However, the Sixth Circuit refused, because "[w]hen the defendant moves for and obtains summary judgment before the class has been properly notified, the defendant waives the right to have notice sent to the class, and the district court's decision binds only the named plaintiffs." The court explained that certification notice is a necessary prerequisite for class members to become legally bound, and its ruling was required by the "general rule of movant beware." After the defendant's successful summary judgment motion, the trial court's certification of the class became a nullity and the case therefore did not need to be remanded for post-judgment notice.

VIII. Fairness and Notice Standard For Settlements Reached Prior to Class Certification

The Ninth Circuit recently addressed the standards a district court must apply in evaluating whether a class action settlement reached prior to class certification is fair, reasonable, and adequate under Rule 23. In *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035 (9th Cir. 2019), the court reversed and remanded a district court's settlement approval order for failing to apply "our longstanding precedent requiring a heightened fairness inquiry prior to class certification." Among the "numerous problematic aspects of the settlement and subtle signs of implicit collusion that the district court was obligated to—but did not—investigate or adequately address" were (1) a clear sailing agreement, under which the defendants agreed not to object to a fees-and-expense award of up to $1 million, (2) a disproportionate cash distribution to attorneys' fees, (3) large incentive payments to named plaintiffs seemingly untethered from service to the class, and (4) reversionary clauses that would return unclaimed funds to the defendants. The court remanded the case to allow the district court to apply the proper standard, but not before expressing "serious doubt" that the settlement meets the standard.

The court also addressed the adequacy of class notice in a case where class members are difficult to reach because of their "'transient' nature." After the claims administrator sent notice to the class members, who were exotic dancers, by mail, 1,546 of 4,681 notices were returned as undeliverable. The administrator performed address traces and resent notices, but ultimately a total of 560 notices remained undeliverable. And where mailed notice was deliverable, no follow-up notice was sent, contributing to what an objector had argued was a "low claims rate" of 18.5%.

On de novo review, the court held that the notice program failed to satisfy Rule 23's "best notice practicable" standard. It found the notice program's treatment of former employees, as distinct from current employees, to be "particularly problematic." It was troubled that no other means beyond mail were employed to contact former employees notwithstanding acknowledged concerns that former employees would be the most difficult to reach by mail. Although posters were also hung in nightclubs where dancers work, this notice was reasonably calculated to reach only current employees, according to the court.

IX. Challenges to Nationwide Classes Involving Varying State Laws

In our Spring 2019 and Fall 2019 updates, we discussed the en banc Ninth Circuit opinion in *Espinosa v. Ahearn (In re Hyundai & Kia Fuel Econ. Litig.)*, 926 F.3d 539 (9th Cir. 2019), which overturned a panel opinion vacating a district court's certification of a nationwide settlement class in a false advertising class action. The panel had vacated class certification because variations in state law might defeat predominance. The en banc court held that "Subject to constitutional limitations and the forum state's choice-of-law rules, a court adjudicating a multistate class action is free to apply the substantive law of a single state to the entire class." The court also confirmed that the party seeking to apply foreign law bears the burden of showing that foreign law, rather than California law, should apply to class claims.

We also noted that the Ninth Circuit in *Stromburg v. Qualcomm, Inc.*, No. 19-15159 (filed Oct. 11, 2018), is currently considering whether state law variations with respect to *Illinois Brick*-repealer rules defeat predominance, and we described an AAI amicus brief arguing that California's choice-of-law rules do not prevent the court from applying California's rule permitting indirect-purchaser suits, which would render antitrust standing a common question under Rule 23. Oral argument was held on December 2 before Judges Siler, Bybee and Nelson. On March 3, the court ordered simultaneous supplemental briefing by the parties on whether the appeal should be held in abeyance pending a merits decision in Qualcomm's appeal of the FTC's case challenging the same conduct, which is also pending before the Ninth Circuit. The parties submitted supplemental briefs on March 20. As of this writing, the court has not yet ruled on whether to hold the appeal in abeyance.

X. DOJ Advocacy in Private Class Action Proceedings

In our Spring 2018, Spring 2019, and Fall 2019 updates, we discussed various interventions in private cases by the Consumer Protection Branch and the Antitrust Division of the Department of Justice (DOJ), including to engage in unprecedented scrutiny of CAFA notices, to interpose multiple objections to private class action settlements, and, recently, to participate directly in the enforcement of a private class action settlement.

In May, in a perhaps cynically titled essay directed to the United Kingdom's Supreme Court, "*Merricks v. Mastercard*: 'Passing On' the U.S. Experience," U.S. Assistant Attorney General Makan Delrahim, writing on behalf of the Antitrust Division, revealed that the Trump Administration may embrace many of the most conservative and controversial views on American class action law, treating private class actions with skepticism and hostility.

In *Merrick*, the UK Supreme Court is poised to address the UK's collective-action proceedings in indirect purchaser cases, and General Delrahim's essay states that it "aims to share the United States' experiences" with collective actions on the topics of class certification and damages distribution. But in recounting these experiences, the essay focuses on atypical U.S. court cases making it particularly difficult to certify classes. These courts, for example, have resolved, at class certification, the merits of plaintiffs' claims and chosen between competing expert models for showing injury and damages, often under the pretense of conducting a "rigorous analysis" of whether Rule 23's requirements are satisfied.

Citing repeatedly and uncritically to many of the most controversial such opinions, including, for example, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619 (D.C. Cir. 2019); *In re Lamictal Direct Purchaser Antitrust Litig.*, No. 19-1655, 2020 WL 1933260 (3d Cir. 2020); and *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018), the essay focuses on ensuring that "the UK Supreme Court properly aligns the incentives for these new private collective-action proceedings," and warning against "improperly low standards for class certification [that] create a 'risk of "in terrorem" settlements.'"

In a critique of the essay, Michael Hausfeld, Irving Sher and Laurence Sorkin of Hausfeld LLP argue, "In providing its views of U.S. class action law, the Division's commentary exalts damage analysis above the importance of recovery for misconduct, and allows economic opinions to control class certification determinations that are fundamentally legal in nature. The Division's approach fails to acknowledge any of the interests served by meaningful collective redress in competition cases."

The authors argue that the test for UK collective actions ought to "take[] into account the complexities of calculating loss in competition law claims," but also should "not prove unduly burdensome for would-be representatives such that valid claims fail, rights to compensation are not vindicated, and the proceeds of anticompetitive conduct remain with the wrongdoer."

XI. ACPERA Reauthorization

The Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), enacted by Congress in 2004 and reauthorized in 2010, is scheduled to sunset on June 22, 2020. On March 3, Senator Lindsay Graham (R-SC) introduced a bill in the Senate, S. 3377, to permanently reauthorize ACPERA. On May 28, a companion bill was introduced in the House by Congressman Joe Neguse (D-CO), Congressman Jerrold Nadler (D-NY), Congressman Jim Jordan (R-OH), Congressman David Cicilline (D-RI), and Congressman Jim Sensenbrenner (R-WI).

ACPERA has important implications for private enforcement because it defines the rights and obligations of leniency applicants who report criminal wronging to the Department of Justice. One of the key provisions of ACPERA is its "detrebling relief," relieving a leniency applicant accepted into the program of treble damages otherwise available to plaintiffs in civil actions arising from the

anticompetitive activity of the applicant that is within the scope of the leniency agreement. Detrebling relief is available, however, only if the applicant cooperates satisfactorily with the private civil damages plaintiff seeking recovery from the applicant's co-conspirators. Among other things, the leniency applicant must provide the civil plaintiff a full account of all facts, furnish documents and other items, and submit to interviews, depositions and testimony.

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